

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

UNITED STATES OF AMERICA,

v.

1:09-cr-00216-WSD-1

ANTHONY BRIAN WHETSTONE,

Defendant.

OPINION AND ORDER

This matter is before the Court on Defendant Anthony Brian Whetstone's ("Defendant") *pro se* Motion for Default Judgment [167] ("Motion").

I. BACKGROUND

On February 8, 2011, Defendant was sentenced to four hundred twenty-five (425) months incarceration, with five (5) years of supervised release, after pleading guilty to one count of Robbery Affecting Interstate Commerce, in violation of 18 U.S.C. §§ 1951 and 2, two counts of Use of a Firearm During a Crime of Violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2, and one count of Armed Bank Robbery, in violation of 18 U.S.C. §§ 2113(a) and (d) and 2. ([121]).

On August 8, 2016, Defendant filed his *pro se* Motion entitled "Verified Petition and Brief to Vacate Void Judgment; Motion for Judicial Notice; Notice of Subrogation & Demand for Payment" [162] ("Verified Petition").

On October 6, 2016, Magistrate Judge Catherine M. Salinas submitted her Final Report and Recommendation (“R&R”) [164], recommending that the Court deny Defendant’s Verified Petition. The Magistrate Judge notified Defendant that any objections to the R&R must be filed “within fourteen (14) days of service of this Order.” (Order Regarding Objections [165] at 1). On October 7, 2016, the Clerk’s Office entered on the docket and mailed to the Defendant the R&R and Order Regarding Objections.

On October 27, 2016, the Clerk’s Office submitted the Verified Petition and R&R to the Court. (October 27, 2016, Docket Entry). Defendant did not file any objections to the R&R.

On November 28, 2016, the Court adopted the Magistrate Judge’s R&R and denied Defendant’s Verified Petition. ([166]).

On December 10, 2016, Defendant filed his Motion for Default Judgment. In it, Defendant requests that the Court enter an “an order of default against [the Government] because [the Government] has failed to answer, plead or otherwise defend [its] position in regard to the defendant’s Verified Petition and Brief to Vacate Void Judgment.” (Mot. at 1).

II. DISCUSSION

Defendant's Motion for Default Judgment against the Government is without merit. The Court did not order the Government to file a response to Defendant's Verified Petition, rather it referred this matter to the Magistrate Judge "to issue a Report and Recommendation concerning the merits of the [Verified Petition] and whether it should be construed as a Section 2255 Motion." (October 3, 2016, Order [163]). The Magistrate Judge issued her R&R three (3) days later recommending denial of the Verified Petition.¹

The R&R was sent to Defendant, who failed to file objections to the R&R, even though the Magistrate Judge warned Defendant that "[i]f no objections are filed, the report and recommendation may be adopted as the opinion and order of the District Court. . . ." ([165] at 1-2). Defendant's Motion for Default Judgment does not present any specific objections regarding the findings and recommendations in the R&R or the findings in the Order Adopting the R&R [166]. Defendant's opportunity to file objections has expired and Defendant does not provide any recourse for the Court to reconsider the R&R or its Order adopting it.

¹ The Government did not file a response to the Verified Petition as it was not required by the Court.


Default judgment is also not permitted in this context. Default judgment is never allowed against the United States, unless the claimant produces sufficient evidence to substantiate his claims on the merits, and the remedy is not contemplated in the context of a § 2255 motion. See Aziz v. Leferve, 830 F.2d 184, 187 (11th Cir. 1987), and Federal Rule of Civil Procedure 55(d); see also Sagoes v. United States, Criminal No. 1:09-cr-00049-ELR-GGB, Civil Action No. 1:11-cv-01188-JEC, 2014 WL 1681596, at *3 (N.D. Ga. Apr. 28, 2014) (Carnes, J.) (same). Even if the Government fails to timely respond to Defendant's Motion, the Court is not permitted to enter default judgment against the Government. Defendant's Motion for Default is meritless and required to be denied.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendant Anthony Brian Whetstone's *pro se* Motion for Default Judgment [167] is **DENIED**.

SO ORDERED this 3rd day of January, 2017.



WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE